UMBC FINANCE LTD.

v.

ROBIN WOON KIM YAN

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-64 OF 1990]
20 SEPTEMBER 1990

EVIDENCE: *Guarantee - Parole evidence - Section 92 Evidence Act 1950.*

CIVIL PROCEDURE: *Admissibility of affidavit of deceased person - Highly contentious - Wide discretion of Court - Scope and object - Order 38 r. 2 of Rules of the High Court 1980.*

The appellant bank UMBC commenced proceedings for the recovery of a certain sum of money from the respondent R under a guarantee. After numerous postponements R sought by summons-in-chambers under O. 38 r. 2 Rules of the High Court 1980 (RHC) to admit as evidence the affidavit of K (now deceased). This evidence was highly contentious whereby K was said to have made a verbal undertaking on behalf of the bank on 7 November 1970 when he was director of the bank and confirmed it by a letter subsequently. R's application was granted. UMBC hence appeals.

Held:

[1] (a) Order 38 r. 2 of RHC deals with the procedure of admitting affidavit evidence and does not deal with admissibility of evidence; the Court is given a wide discretion as to whether the affidavit of any witness may be read at the trial.

(b) An order under O. 38 r. 2 of RHC should not be made if the evidence is strongly contested or where the evidence relates closely to the credibility of the witness or where by its very nature the evidence needs to be examined closely and its admissibility yet to be determined.

[2] Evidence in the nature sought to be admitted in the said affidavit is only admissible on the terms of s. 92 of the Evidence Act dealing with the admissibility of oral evidence or statement where there is a contemporaneous or collateral separate oral agreement on which a document is silent; the admissibility should be determined at the trial, not at an interlocutory stage such as this.

[3] It is not a proper exercise of discretion to allow evidence under O. 38 r. 2 of the RHC where the evidence is highly contentious and its admissibility is in issue.

[Appeal allowed.]

Cases referred to:
Bank of Australasia v. Palmer [1897] AC 540
Wickman Tools v. Schuler A.G. [1974] AC 235

Legislation referred to:
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 38 r. 2

For the appellant - Ngeh Koo Ham; M/s. Nga Hock Cheh & Co.
For the respondent - K. Gunaretnam; M/s. Sault & Co.

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

This was an appeal against the decision of the learned Judicial Commissioner, Melaka who allowed an application by the defendant in a civil suit for leave to read the affidavit of one Kang Kok Seng who was a witness subpoenaed for the trial but who has since died. We allowed the appeal with costs.

The main suit, Civil Suit No. 23-181 of 1976, commenced with the issue of writ by the appellant bank as plaintiff to recover a certain sum of money from the respondent pursuant to a letter of guarantee executed between them.

The defendant/respondent, Robin Woon Kim Yan is the defendant in the suit pending for hearing in the High Court of Melaka. For some reason known only to the learned Judge concerned and the Counsel for the parties in the suit, the hearing of the suit was postponed on numerous occasions. Finally on 9 December 1988 the defendant/respondent applied by summons-in-chambers seeking for an affidavit of the said Kang Kok Seng affirmed on 11 May 1981 to be "admitted as evidence in the proceeding". The application was made under O. 38 r. 2 of the Rules of the High Court 1980 and the affidavit in support stated that the claim against the defendant/respondent was for a sum of RM465,000 in Malaysian ringgit and interest thereon pursuant to a guarantee. The affidavit reiterated what was pleaded in the statement of defence that the bank had verbally agreed that the guarantee was to be withdrawn as soon as the debenture over all the assets of the company was executed. The said Kang Kok Seng (now deceased) was said to have made a verbal undertaking on behalf of the bank on 7 November 1970 when he was director of the bank and confirmed it by a letter subsequently. It is obvious from the nature of the claim and the nature of the evidence sought to be adduced in the affidavit referred to in the summons in chambers that the evidence sought to be admitted was highly contentious.

The application was made under O. 38 r. 2 of the Rules of the High Court 1980 and for the purpose of this appeal it is best to see the scope and object of the rule.

Since the claim is based on a guarantee the liability of the guarantor will depend very much on the language of the instrument and among other things the appellant is entitled to rely on the rule reiterated in *Wickman Tools v. Schuler A.G.* [1974] AC 235:

> The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

It is an old principle echoed by Lord Morris in *Bank of Australasia v. Palmer* [1897] AC 540 that "...parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.

Evidence in the nature sought to be admitted in the said affidavit is only admissible on the terms of s. 92 of the Evidence Act dealing with the admissibility of oral evidence or statement where there is a contemporaneous or collateral separate oral agreement on which a document is silent. The admissibility should be determined at the trial, not at an interlocutory stage such as this. Order 38 r. 2 deals with a procedure of admitting affidavit evidence and does not deal with admissibility of the evidence.

Under O. 38 r. 2 a wide discretion is given to the Court at or before a trial begun by writ whether the Court should make an order that the affidavit of any witness may be read at the trial. The rule clearly says that the Court may exercise the discretion according to the circumstances of the case and whether it is reasonable to make such an order.

Order 38 r. 2 is taken from the equivalent English rule. This rule is used normally for a witness who is abroad and therefore not available for the trial or where the evidence is uncontested. An order under O. 38 r. 2 should not be made if the evidence is strongly contested, or where the evidence relates closely to the credibility of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility yet to be determined.

In our view it is not a proper exercise of discretion to allow evidence under O. 38 r. 2 where the evidence is highly contentious and its admissibility is in issue.

Also found at [1991] 1 CLJ 40